

STATE OF MICHIGAN
COURT OF APPEALS

In re MANUEL J. MOROUN and DAN
STAMPER.

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Plaintiff-Appellee,

v

DETROIT INTERNATIONAL BRIDGE
COMPANY and SAFECO INSURANCE
COMPANY OF AMERICA,

Defendants,

and

MANUEL J. MOROUN and DAN STAMPER,

Appellants.

FOR PUBLICATION
February 6, 2012
9:00 a.m.

No. 308053
Wayne Circuit Court
LC No. 09-015581-CK

Advance Sheets Version

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

K. F. KELLY, J.

Appellants, Manuel J. Moroun and Dan Stamper, appeal as of right the trial court's January 12, 2012, order directing that they be imprisoned in the Wayne County jail until defendant Detroit International Bridge Company (DIBC) fully complied with the trial court's opinion and order of February 1, 2010. Moroun is a director of DIBC and Stamper is its president. Previously, on November 3, 2011, the trial court found DIBC in civil contempt for failing to comply with the February 1, 2010, order, which had been entered in the underlying lawsuit filed by plaintiff Michigan Department of Transportation (MDOT) against DIBC and

Safeco Insurance Company of America.¹ We conclude that appellants' due-process rights were not violated and that the trial court was clearly acting within its inherent and statutory powers to order DIBC's key decision-makers incarcerated pending DIBC's compliance with the trial court's February 1, 2010, order. However, the commitment order requiring full compliance cannot stand because appellants do not have the immediate ability to completely finish construction and thus "purge" DIBC of the contempt. Because the commitment order does not provide appellants with the "keys to the jailhouse," we vacate that portion of the trial court's commitment order that continues incarceration until DIBC has "fully complied" and remand the case to the trial court. On remand, the trial court shall craft an order stating with particularity what act or duty appellants must perform both to ensure that DIBC will begin and continue compliance with the court's February 1, 2010, order as well as to enable them to purge themselves of the contempt finding against DIBC. Accordingly, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

The underlying lawsuit arises from the Ambassador Bridge Gateway Project, which is intended to facilitate the flow of traffic between the United States and Canada over the Ambassador Bridge (the Bridge) by constructing interstate freeway connections to the Bridge. DIBC owns and operates the Bridge. Stamper is the president of DIBC and is extensively involved in the operation and construction activities at the Bridge and in the defense of this lawsuit. Moroun has a living trust that is a minority shareholder of DIBC Holdings, Inc., which, in turn, owns DIBC. Moroun is also a director on the boards for DIBC and DIBC Holdings.

In April 2004, MDOT and DIBC executed an agreement, which required DIBC to construct Part A of the project in accordance with MDOT specifications and standards; plans and designs were attached to the contract as exhibits. DIBC was responsible for 100 percent of the costs associated with Part A, including construction and property acquisition costs. Because DIBC was unable to acquire all the property interests needed to complete Part A, the contract was amended in February 2006, whereby MDOT assumed responsibility to acquire, through the power of eminent domain if necessary, the property interests encompassed by a portion of Part A. On March 12, 2007, a performance bond was executed, which provided that DIBC and Safeco "are held and firmly bound unto" MDOT in the penal sum of \$34,664,650 and that "the condition of this obligation is such that if the above named principal shall and will, well and faithfully, and fully, do execute and perform all of the obligations contained in the attached documents identified as Exhibits A through Exhibit E, listed below." Exhibit E was described in the bond as "Plans for DIBC portion of the Ambassador Bridge/Gateway Project (Part A, DIBC portion) per MDOT/DIBC agreement as amended." In November 2007, MDOT and DIBC also executed a maintenance agreement, whereby DIBC agreed to maintain and operate certain physical features or structures located on a portion of M-85, including a truck road and related

¹ As explained in greater detail later in this opinion, the underlying lawsuit concerns a large construction project undertaken by MDOT and DIBC. Safeco, as surety, issued a performance bond supporting DIBC's portion of the project.

infrastructure, and a gate system. The parties also agreed that DIBC could use M-85, the I-75 exit ramp, and an access easement road in emergency situations, under certain conditions and limitations set forth in the agreement.

On June 24, 2009, MDOT filed a lawsuit against DIBC and Safeco alleging that DIBC had not performed the construction in accordance with the agreements. Among other claims, MDOT alleged that DIBC was constructing Part A according to a “Conflicting Design,” a plan not approved by MDOT, the Federal Highway Administration, or the city of Detroit, which included (1) constructing permanent tollbooths in the location where DIBC had agreed to construct an access easement drive, (2) installing facilities including automobile-fueling pumps in the location where it had agreed to construct DIBC Ramp S04, the ramp over 23rd Street for traffic to Canada, (3) installing facilities including underground fuel tanks in the location where it had agreed to construct the two-lane truck road and DIBC Ramp S05, the ramp over 23rd street carrying truck traffic to the interstate highways, and (4) constructing Pier 19 at a location that blocks construction of the two-lane truck road from the truck plaza, as well as a “special return route” for maintenance and emergency vehicles. MDOT sought a cease-and-desist order regarding ongoing construction activities by DIBC, reimbursement for costs associated with contractual breaches of the parties’ agreements, an order of specific performance to direct DIBC to engage in construction consistent with the agreement, damages incurred as a result of DIBC’s actions, and any other appropriate equitable and monetary relief.

On October 29, 2009, MDOT filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the two-lane access road for the project. Two weeks later, on November 13, 2009, MDOT filed a second motion for partial summary disposition and an order for specific performance pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the necessary roads, ramps, and bridges to connect the I-75 and I-96 freeways directly to the Ambassador Bridge in accordance with the agreed design for those structures. In response to these motions, DIBC essentially argued that the parties had developed a “flexible” plan, that they had merely committed to a “design concept,” and that they did not memorialize any particular plan or agreement regarding the design or construction of particular roads, structures, or improvements. DIBC submitted the affidavit of Stamper to support its assertion that there was never “an immutable, final, agreed set of plans.”

On February 1, 2010, the trial court issued an opinion and order granting both motions and granting MDOT’s request for specific performance. The trial court found that MDOT and DIBC had “agreed on a design for DIBC’s Part A of the project,” as reflected in the agreements and incorporated into the performance bond, and that DIBC had not constructed Part A according to the agreed-upon design. In doing so, the trial court rejected DIBC’s arguments that it was not restricted by the contract to a particular design and that it could unilaterally substitute different access routes. The trial court further noted that “DIBC ha[d] constructed permanent structures and facilities in conflict with the designs for the easement, road and ramps.” Accordingly, the trial court directed DIBC, among other things, to “remove structures that have been constructed in the path of the access road and recorded easement and complete construction of its portion of the Gateway Project in accordance with the plans attached to the Performance Bond and the Maintenance Agreement.”

On February 19, 2010, DIBC filed an emergency application seeking leave to appeal the court's opinion and order granting partial summary disposition, along with motions for immediate consideration and for a stay of the order. This Court denied DIBC's interlocutory application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered March 17, 2010 (Docket No. 296567).

DIBC then filed a motion in the trial court seeking revisions, clarification, and amendment of the order because the order did not address the issue of material and nonmaterial changes. DIBC claimed that MDOT's approval was not needed for nonmaterial changes. At a hearing conducted on April 23, 2010, the trial court ruled that its order was enforceable, that a timetable for the completion of construction submitted by DIBC was unsatisfactory, and that DIBC's motion for revision, clarification, and amendment was frivolous.

Four days later, the trial court issued an order to show cause, directing DIBC and Stamper to appear in court on May 10, 2010, to explain why DIBC should not be held in civil contempt for failing to comply with the terms of the February 1, 2010, opinion and order. On the same day, DIBC filed an application with the Supreme Court, as well as a motion for a stay and a motion for immediate consideration, seeking leave to appeal this Court's denial of its application for leave to appeal filed in Docket No. 296567. The Supreme Court initially granted a stay, but subsequently denied DIBC's application for leave to appeal and vacated the stay. *Dep't of Transp v Detroit Int'l Bridge Co*, 486 Mich 937 (2010).

The trial court rescheduled the show-cause hearing for June 10, 2010, and then for September 23, 2010, but as a result of DIBC's attempt to remove the lawsuit to federal district court, each hearing was adjourned. The trial court was finally able to conduct the show-cause hearing in December 2010, over the course of three days. Stamper appeared and testified at the hearing. On January 10, 2011, the trial court ruled that it was finding by clear and unequivocal evidence that (1) DIBC was not complying with the terms and provisions of the February 1, 2010, order, (2) the failure to comply impaired the authority and impeded the functioning of the court, (3) DIBC's acts and omissions occurred outside of the presence of the court, and (4) DIBC was in civil contempt. The trial court found that the timetable submitted by DIBC, which provided a completion date in June 2013, was completely unacceptable, especially given that at least 60 to 70 percent of the work had been completed, and directed DIBC to submit a detailed timetable that would ensure full compliance with the February 1, 2010, order within one year. The trial court also directed DIBC to submit biweekly reports regarding all scheduled work and work in progress. The trial court further ordered that Stamper be imprisoned in the Wayne County jail until DIBC began to comply with the February 1, 2010, order. Stamper was released later in the day once it was reported to the trial court that DIBC was beginning to comply with the order to remove the structures.

DIBC again filed an application seeking leave to appeal the February 1, 2010, opinion and order as well as the January 10, 2011, contempt order. This Court denied DIBC's interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered March 18, 2011 (Docket No. 302330). DIBC did not seek leave to appeal in the Supreme Court.

In June 2011, MDOT filed an ex parte motion for continuation of contempt proceedings under MCR 3.606(A) because of DIBC's continuing violation of the court's February 1, 2010, opinion and order. In its motion, MDOT claimed that DIBC had not removed any conflicting structures and had not constructed any public roads, as ordered by the court. MDOT submitted an affidavit supporting the motion. On June 13, 2011, the trial court issued a show-cause order directing Stamper and DIBC to personally appear and show cause why DIBC should not be held in civil contempt for failure to comply with the terms and provisions of the February 1, 2010, opinion and order. DIBC's resident agent was served with the order. Stamper was also personally served with the order, appeared at the hearing as directed, and provided testimony in defense of the civil contempt charge against DIBC at subsequent hearings conducted in September and October 2011.

The trial court issued an opinion and order on November 3, 2011, in which it found by clear and unequivocal evidence that DIBC was in violation of the February 1, 2010, order, and therefore ruled that DIBC was, again, in civil contempt of the court. The trial court stated that the project site plan that was illustrated in the C-1 drawing "identifies the major components" of the Gateway Agreement and that DIBC was responsible for constructing "various components" shown in the C-1 drawing, which included the SOL Bridge for outbound traffic to Canada and the "4/3 lane" road under the SOL Bridge. After describing the fatal background and previous proceedings in this case, the court summarized the testimony from the hearing and then set forth the following findings of fact:

DIBC has provided plans for construction and has constructed parts of a design that is not in agreement with the approved design. DIBC's request for a variance for the alternate design has been denied by MDOT. The proposed substitute design materially changes the approved design. The proposed construction plans leave out important parts of the approved design including the two-lane access road and special return routes shown on the C-1 drawing and the Maintenance Agreement. Additionally, DIBC has not removed various conflicting structures that are in the path of roads shown in the approved design.

The C-1 drawing in Exhibit E to the Performance Bond required DIBC to construct a four lane road that proceeds in a southerly direction under [the] SOL [ramp] and between its piers. The C-1 drawing shows the four lanes making a turn to the west, paralleling Fort Street and then narrowing to three lanes. The as-built plans submitted by DIBC, show that piers of SOL (piers 11, 12, and 13) are in conflict with the four lane road that passes under SOL. DIBC did not submit preliminary and final construction plans to MDOT for approval, prior to the start of construction of SOL as required by the Gateway Agreement. DIBC constructed a two lane road that proceeds in a southerly direction under SOL between the piers conflicting with the C-1 drawing. Cars using those two lanes may stop for fueling, stop at the duty free store or proceed to SOL. Truck traffic is routed in a southwesterly direction at pier 11, through newly constructed toll booths toward a truck fueling area. The car fueling area is in the path of the 4/3 lane road shown in C-1. SOL as presently constructed, is not in compliance with the February 1, 2010 Order of this Court. Mr. [Thomas] LaCross[, an engineer serving as project manager for the Ambassador Bridge Gateway project on behalf of DIBC,] and

Mr. [Michael] Anderson[, an engineer employed by a security firm representing Safeco,] acknowledged that SOL was not constructed in conformity with C-1 of Exhibit E to the Performance Bond.

DIBC has sought approval for variances, including approval for nonconforming as-built plans for SOL from MDOT; however, those requests have not been approved. DIBC has not submitted construction plans that satisfy the requirements of the plans attached to the Performance Bond and the Maintenance Agreement for the access road and the truck road. The truck road from Canada is a two lane road that carries truck traffic in a westerly direction, parallel to Fort Street. The truck road continues to the S02 Bridge to S32 to convey truck traffic onto the freeways. Pier 19 conflicts with the proposed truck road. Plans have not been submitted for the correction of piers 11, 12, 13 and the relocation of pier 19.

With respect to sanctions, the trial court listed options it was considering to coerce compliance with the February 1, 2010, order: (1) requiring DIBC's surety, Safeco, to take over responsibility for completing the project, (2) having MDOT or another construction company complete DIBC's portion of the project, (3) *financial sanctions or imprisonment, or both*, and (4) appointment of a receiver to stand in the place of the owner of DIBC (Moroun, according to the court) and its officers with authority to make decisions regarding the implementation of the February 1, 2010, order. The trial court indicated that it would make this sanction determination at a hearing on January 12, 2012, and directed DIBC in the interim to remove conflicting structures and perform construction in accordance with the C-1 drawing. The trial court also directed Moroun and "the top company officer for DIBC" to appear before the court on January 12, 2012, on the sanctions issue.

DIBC filed an application seeking leave to appeal the November 3, 2011, order and a motion for immediate consideration. This Court denied the interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered January 10, 2012 (Docket No. 307306).

In the meantime, Moroun filed a motion to be excused from appearing at the January 12, 2012, hearing. Moroun's motion stated that it was intended to inform the trial court that he was not the owner of DIBC and that he was not the decision-maker with respect to the Gateway Project, and further asserted:

Mr. Moroun is not the owner of DIBC. DIBC is owned by DIBC Holdings, Inc. ("DIBC Holdings"). The Manuel J. Moroun Trust Dated March 24, 1977 As Amended and Restated on August 28, 1996 is a minority owner of DIBC Holdings. Mr. Moroun is a member of DIBC's board of directors, and he has not been a statutory officer of DIBC during any pertinent time. While Mr. Moroun has been informed about the Ambassador Bridge Gateway Project ("Gateway Project") and this Court's order regarding the Gateway Project, from the inception, authority over the Gateway Project – and subsequently this litigation – has been the responsibility of Dan Stamper, DIBC's president for over 20 years.

MDOT filed a response to the motion, asserting that Moroun should not be excused from the hearing regarding sanctions for the contempt order because he was a director and owner of DIBC Holdings, Inc., which is the sole owner of DIBC and DIBC was under the trial court's authority and jurisdiction. MDOT also asserted that Moroun and Stamper were directors of DIBC and that they constituted a majority in control of DIBC. MDOT also pointed out that Stamper had testified at the show-cause hearing that he reported to the board of directors, which included Moroun.

The parties, and appellants, along with their attorneys, appeared at the hearing conducted on January 12, 2012. In denying Moroun's motion to be excused, the trial court stated:

In addition, the claim that Manuel Moroun has no control or authority is not supported by the record of this case. Mr. Moroun has the power, the authority to make sure that there is compliance with the February 1st, 2010 Order of this Court. The request to excuse Mr. Moroun from this hearing is therefore denied.

After discussing several options for sanctions, the trial court stated that DIBC "is best equipped to complete the project at this time" because it has the power, the resources, and the knowledge to comply with the court's order, and that the "key decision makers," who were Manuel Moroun, Stamper and Matthew Moroun (Manuel Moroun's son and the vice president of DIBC), had the responsibility to ensure that DIBC fully complied with the order. The trial court then directed DIBC to pay the maximum fine of \$7,500 and MDOT's costs and reasonable attorney fees and directed that appellants be imprisoned in the Wayne County jail until DIBC complied with the court's February 1, 2010, order. The trial court also entered an opinion and order incorporating these rulings. In relevant part, the order provides:

IT IS ORDERED THAT Manuel "Matty" Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.

IT IS ORDERED THAT the imprisonment of Manuel "Matty" Moroun and Dan Stamper shall cease when the Detroit International Bridge Company has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Finally, the trial court continued the matter to February 9, 2012, "for further review of the status of the project and the appearance of the Vice President of DIBC, Matthew Moroun."

Appellants filed a claim of appeal, along with a motion for release pending appeal. This Court denied the latter on January 12, 2012. The following day, appellants filed motions for peremptory reversal, for a stay, and for immediate consideration. This Court denied the motion for peremptory reversal, but granted, in part, the motion for a stay, releasing appellants until further order of this Court. This Court also expedited the appeal by shortening the briefing schedule and scheduling the matter for oral argument on February 2, 2012.

II. JURISDICTION

Appellants claim that their appeal is as of right, citing MCR 7.203(A), MCR 7.204, and MCR 7.202(6)(a). MDOT asserts “this Court does *not* have jurisdiction . . . as claimed by both DIBC and its corporate officials, because the January 12, 2012 order is not a final order appealable by right.” MDOT makes no further argument, however, believing that “[i]t appears this Court has treated the corporate officials’ claim of appeal as an application for leave to appeal under MCR 7.203(B) the January 12, 2012 Opinion and Order, and granted it.” We clarify that we have not treated this appeal as on application for leave to appeal; instead, we conclude that appellants may appeal as of right.

In this case, DIBC, a party to the underlying lawsuit, was held in *civil* contempt of court, which must be distinguished from *criminal* contempt; whereas the former is coercive, the latter is punitive. *In re Contempt of Dougherty*, 429 Mich 81, 95; 413 NW2d 393 (1987). Criminal contempt is a crime and, therefore, an order finding a party in criminal contempt of court and sanctioning the party is a final order from which the contemnor may appeal as of right. See MCL 600.308(1); MCR 7.203(A); MCR 7.202(6)(b); *In re Contempt of Dudzinski*, 257 Mich App 96, 97; 667 NW2d 68 (2003); *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). However, an order finding a party in civil contempt of court is not a final order for purposes of appellate review. See MCL 600.308(2); MCR 7.202(6)(a).

Civil contempt is clearly at issue in this case because the trial court sought to compel DIBC’s compliance with its February 1, 2010, order. Thus, an appeal by DIBC of the civil contempt order entered on November 3, 2011, must be made by application, not as of right. However, the same is not true for the individual appellants, Moroun and Stamper, who are nonparties who have not been held in contempt but instead have been sanctioned for DIBC’s contempt. Even if a final order against DIBC had been issued, appellants would not have the ability to appeal as of right under MCR 7.203(A) because they do not have party status. Thus, limiting appellants to only seeking leave to appeal by application would be tantamount to denying them the right to appellate review of the trial court’s imposition of sanctions. We do not believe an individual’s right to appellate review should be so constrained, especially in this context, in which the most severe sanction—incarceration—is used to coerce compliance with a trial court’s order.

Under federal law, “[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned” even absent a final order. *United States Catholic Conference v Abortion Rights Mobilization, Inc.*, 487 US 72, 76; 108 S Ct 2268; 101 L Ed 2d 69 (1988) (in the context of finding a witness in contempt). We have also previously treated an appeal from nonparties held in civil contempt of court as an appeal by right, though the issue was never specifically raised or discussed. See, e.g., *Droomers v Parnell*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2005 (Docket No. 253455) (nonparty officers of a corporation); *In re Radulovich*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 210779) (attorney who represented a party in an underlying matter). Although appellants have not been held in contempt, but sanctioned as decision-makers to enforce DIBC’s compliance with the court’s order, we conclude that the same principles apply. This matter is properly before us by means of a claim of appeal.

III. DUE PROCESS

Appellants contend that they were not afforded due process because they were never put on notice that they were in jeopardy of being imprisoned as a result of DIBC's civil contempt. We disagree. Whether a person has been afforded due process is a question of law that is reviewed de novo. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

A trial court has inherent and statutory authority to enforce its orders. MCL 600.611; MCL 600.1711; MCL 600.1715. In civil contempt proceedings, a trial court employs its contempt power to coerce compliance with a present or future obligation, including compliance with a court order, to reimburse the complainant for costs incurred as a result of contemptuous behavior, or both. *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

The trial court must carry out the proper procedures before it can issue an order holding a party or individual in contempt of court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711; 624 NW2d 443 (2000). As opposed to a criminal contempt proceeding, in which some, but not all, of the due-process safeguards of an ordinary criminal trial are used, a civil contempt proceeding only requires "rudimentary" due process, i.e., "notice and an opportunity to present a defense" *Porter*, 285 Mich App at 456-457; see also *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994) ("Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required.").

Appellants assert that they are not DIBC and that "the fiction" underlying the trial court's January 12, 2012, order is that they are "tantamount to DIBC" and "stand in its place vis a vis the contempt proceedings." They also cite caselaw supporting the proposition that a corporation is a separate entity from its individual shareholders, officers, and directors. However, appellants have overlooked that a corporation can only act through its officers and agents. See *In re Kennison Sales & Engineering Co, Inc*, 363 Mich 612, 617; 110 NW2d 579 (1961), quoting *Stowe v Wolverine Metal Specialties Co*, 242 Mich 624, 628; 219 NW 714 (1928). "When a court acquires jurisdiction over a corporation as a party, it obtains jurisdiction over the official conduct of the corporate officers so far as the conduct may be involved in the remedy against the corporation which the court is called upon to enforce." *Stowe*, 242 Mich at 629, quoting *Tolleson v People's Savings Bank*, 85 Ga 171; 11 SE 599 (1890). Courts will also disregard the separate existence of corporate entities when it is "used to defeat public convenience, justify wrong, protect fraud, or defend crime" *Paul v Univ Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938).

Because individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, these same individuals may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. *Wilson v United States*, 221 US 361, 376; 31 S Ct 538; 55 L Ed 771 (1911). In *Wilson*, the United States Supreme Court stated:

A command to [a] corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ

directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. [*Id.*]

See also *Electrical Workers Pension Trust Fund of Local Union 58, IBEW v Gary's Electrical Serv Co*, 340 F3d 373, 380 (CA 6, 2003), and *Ex parte Chambers*, 898 SW2d 257, 260 (Tex, 1995). Accordingly, we reject appellants argument that they may not be held accountable for failing to ensure DIBC's compliance with the trial court's order.

Appellants further argue that they were not given notice to show cause why they should not be personally sanctioned, or given an opportunity to be heard, in violation of the United States and Michigan Constitutions and the notice requirements of MCL 600.1711(2) and MCR 3.606(A). When the contempt is committed outside the court's direct view (i.e., "indirect contempt"), as in this case, MCL 600.1711(2) allows a trial court to punish the contemnor by fine or imprisonment, or both, "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." For indirect contempt, the trial court must also comply with MCR 3.606(A), which, on a proper showing on ex parte motion supported by affidavits, requires the trial court to (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct or (2) issue a bench warrant for the arrest of the person.

Appellants' citation of *Auto Club*, 243 Mich App 697, as support for their argument that the trial court was required to name them in the show-cause order is not persuasive. *Auto Club* is distinguishable because the persons accused of contempt, the attorneys, were capable of committing the contemptuous acts on their own, whereas a corporation cannot on its own, contemptuously or otherwise. Rather, as previously noted, a corporation can only act through its officers and agents. Appellants were responsible for ensuring DIBC's compliance with the February 1, 2010, opinion and order, regardless of whether they were parties to the underlying litigation or whether they were named in the trial court's opinion and order. The trial court held DIBC in civil contempt. The trial court found that appellants were the key decision-makers at DIBC, with the responsibility to ensure that DIBC complied with the court's order. Contrary to their claim on appeal, there is sufficient evidence in the record to support this finding.

With respect to Moroun, he represented that he is a director of DIBC and that his trust is a minority shareholder in DIBC Holdings, which owns DIBC. Moreover, Moroun does not dispute that his living trust holds the majority of voting shares in DIBC Holdings. Moroun also acknowledged that he had been informed about the Gateway Project and the court's order regarding the Gateway Project, but claimed that authority over the Gateway Project and the litigation "has been the responsibility of Dan Stamper." He did not otherwise affirmatively assert that he had no authority or responsibility over DIBC or its affairs, and any such assertion would not have been credible.

Furthermore, the November 3, 2011, opinion and order finding DIBC in contempt affirmatively discussed the possible civil contempt sanctions, including imprisonment, and directed Moroun to appear at the sanction hearing. Moroun filed a motion to be excused from the hearing, which, from our perspective, was an attempt to avoid the possibility that he might be

sanctioned for DIBC's civil contempt. Accordingly, we conclude that Moroun was provided notice that he might be sanctioned for DIBC's contempt and an opportunity to be heard on the matter.

With respect to Stamper, he was listed on the show-cause order, was present throughout the contempt hearings, and actively participated in DIBC's defense. He had also previously been imprisoned for DIBC's civil contempt in January 2011. Because there is no dispute regarding Stamper's authority over the company and the project, we conclude that he had notice that he might be incarcerated as a coercive sanction for DIBC's civil contempt and was provided an opportunity to be heard on the matter.

IV. IMPRISONMENT SANCTION

Appellants argue that their imprisonment was an improper use of the civil contempt power and was invalid as a matter of law because the trial court's order did not give them the "keys to their cell[s]." We disagree with appellants to the extent that they argue that incarceration was an improper use of the trial court's civil contempt power; however, we agree with appellants that the trial court erred by requiring their continued incarceration until DIBC "fully complied with" the February 1, 2010, order. We review a trial court's issuance of a contempt order for an abuse of discretion and the factual findings supporting the order for clear error. *Porter*, 285 Mich App at 454-455. "[R]eversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Id.* at 455. To the extent that this Court must examine questions of law related to the trial court's contempt decision, our review is de novo. See *DeGeorge*, 276 Mich App at 591. The interpretation and application of the court rules and statutes are also reviewed de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976). In the civil context, the confinement must be conditional. See MCL 600.1715.

The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. [*Hicks ex rel Feiock v Feiock*, 485 US 624, 635 n 7; 108 S Ct 1423; 99 L Ed 2d 721 (1988).]

Civil contempt imposes a term of imprisonment that ceases when the contemnor complies with the court's order or when it is no longer within his or her power to comply. *Borden*, 67 Mich App at 48. MCL 600.1715 provides:

(1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than \$7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .

(2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, *the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment*, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment. [Emphasis added.]

When the purpose of the sanction is to make a party or person comply, the trial court, in exercising its discretion, must “consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” *Dougherty*, 429 Mich at 98, quoting *United States v United Mine Workers of America*, 330 US 258, 304; 67 S Ct 677; 91 LEd 884 (1947). Clearly, the trial court considered the effectiveness of other sanctions before choosing incarceration to coerce compliance with its order, and provided the following reasons for rejecting other alternatives that MDOT suggested:

One of the options considered was to require DIBC’s surety Safeco to take over the responsibility for completing the project. A default has been taken against Safeco. However, even without the default, Safeco as surety is liable for the responsibilities of its principle [sic] DIBC, which includes completing the project and monetary damages. On July 8, 2011, Safeco was ordered to submit a detailed plan that may be implemented to complete DIBC’s portion of the Gateway Project. MDOT as well as DIBC were given an opportunity to respond to Safeco’s plan. A fair review of the information submitted by the parties in response to Safeco’s plan makes it clear that this project would be bogged down with further litigation in addition to needless delays if Safeco was ordered to take on the construction at this time. Requiring Safeco to take on the construction obligations of DIBC is not the best option available at this time.

The use of an independent contractor to complete DIBC’s portion of the project would also be challenging. There are funding considerations, oversight concerns, probable litigation, as well the contractor’s need to assess the construction requirements which could prove to be a formidable task for a contractor new to the project. The contractor would be required to arrange for the completion of construction drawings for review and approval by MDOT. The assessment and coordination of the construction needed would require interaction with other entities resulting in further delays. The use of an independent contractor would further delay the completion of the project and would therefore not be the best option to use to complete the project.

The use of a receiver would likely produce many of the same problems as those anticipated by the use of an independent contractor. At the Court’s direction, the parties presented briefs discussing their positions regarding the appointment of a receiver. In addition, a hearing was conducted on December 1, 2011, at which time representatives from MDOT, DIBC, and Safeco were allowed to make oral presentations. Based on the information that has been presented, it appears that the appointment of a receiver at this time would generate a number of

issues resulting in additional delays. There are funding issues that would likely bring about additional litigation and delays. There are also the concomitant problems of safeguarding the funds and coordinating construction activities. The receiver would be required to hire design consultants, develop plans for approval by MDOT and obtain bids for construction contracts. Appointing a receiver at this time would likely greatly prolong the time required for the completion of the project. The appointment of a receiver at this time would not be the best option to complete this project.

The trial court further found that DIBC had the power, resources, and knowledge to complete its portion of the project in accordance with the February 1, 2010, order and that the decision-makers of DIBC did not intend to carry out construction of its portion of the project in conformity with the February 1, 2010, order unless the court imposed “meaningful coercive measures.” We cannot say that the trial court’s decision to use coercive measures, including incarceration, over other alternatives fell outside the range of principled outcomes or that the decision constituted an abuse of discretion.²

As previously noted, the trial court’s January 12, 2012, order provides the following with respect to appellants’ conditional imprisonment:

IT IS ORDERED THAT Manuel “Matty” Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.

IT IS ORDERED THAT the imprisonment of Manuel “Matty” Moroun and Dan Stamper shall cease when the Detroit International Bridge Company has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Because the purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience, the contemnor may not be incarcerated beyond the time that he or she is able to comply with the court’s order. *People v Kearns*, 38 Mich App 561, 563; 196 NW2d 805 (1972), quoting *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). “Civil contempt seeks to coerce compliance, to coerce [the contemnor] to do what he is able to do but refuses to do.” *Borden*, 67 Mich App at 48. In other words, the contemnor “carries the keys to his prison in his own pocket.” *Id.* In *Bagwell*, 512 US at 828, the Supreme Court further explained:

² While it is clear that appellants take issue with the order, nevertheless, appellants are not at liberty to disregard the order on the basis of their subjective belief that it was wrong. *Porter*, 285 Mich App 465. “A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date.” *Kirby v Mich High Sch Athletic Ass’n*, 459 Mich 23, 40; 585 NW2d 290 (1998); see also *Henry*, 282 Mich App at 680.

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, carries the keys of his prison in his own pocket. [Quotation marks and citations omitted.]

We cannot uphold the trial court's commitment order when the condition for release requires DIBC to "fully" comply with the February 1, 2010, order because it failed to identify "the act or duty" that must be performed before the incarceration may be terminated. MCL 600.1715(2). While appellants might have the present ability to commence and continue construction, they do not have the present ability to actually finish the construction in accordance with the directives set forth in the February 1, 2010, opinion and order for a period of 6 to 12 months. Therefore, the condition does not permit appellants to use the keys to obtain their release until the project is completed. In other words, appellants may not immediately "avoid the sentence," or purge the contempt, by complying with the terms of the original order. *Hicks*, 485 US at 635 n 7. Our decision does not preclude further civil contempt sanctions, including imprisonment under terms similar to those imposed by the trial court in January 2011. However, we leave this decision to discretion of the trial court. If the trial court orders further sanctions to coerce the initiation and continuation of compliance with its February 1, 2010, order, it must do so within the confines of the caselaw and MCL 600.1715 by identifying the act or duty appellants will be required to perform in order to purge the contempt.

V. JUDICIAL DISQUALIFICATION

Finally, appellants argue that further proceedings should be held before a different judge because the judge acted as both accuser and finder of fact and has become personally embroiled in the litigation. There has been no motion to disqualify the judge; therefore, there is no ruling for us to review. See *Henry*, 282 Mich App at 679, citing MCR 2.003. We further conclude that there is no merit to appellants' position that the judge acted as an accuser and finder of fact by imposing a sanction that was not requested by MDOT. The judge provided an adequate explanation of why other alternatives would not bring about compliance with its order.

VI. CONCLUSION

Accordingly, we conclude that appellants properly appealed as of right because a nonparty individual sanctioned to enforce compliance with a civil contempt order directed at a party must be permitted to appeal even in the absence of a final order. We further conclude that appellants were afforded rudimentary due process, but the conditional confinement did not allow appellants to avoid the sentence by purging the contempt. Therefore, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain

jurisdiction. In light of the trial court's scheduled February 9, 2012, hearing, we give our judgment immediate effect. MCR 7.215(F)(2).

/s/ Kirsten Frank Kelly